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Jeff S. Jordan
Assistant General Counsel
Federal Election Commission
Office of Complaints Examination and Legal Administration
999 E Street, NW
Washington, DC 20463

Re: MUR 6958

Dear Mr. Jordan:

On behalf of McCaskill for Missouri (the "Committee") and Michelle Sherod, in her official capacity as treasurer ("Respondents"), this letter responds to the Complaint filed by the Foundation for Accountability and Civic Trust ("FACT") in the above-referenced matter. The Complaint falsely alleges that Senator Claire McCaskill provided an "in-kind donation" to her Republican opponent Todd Akin by encouraging his campaign to air an advertisement which her polling suggested would ultimately increase her chances of winning reelection. The Complaint does not allege a violation of the law and should be immediately dismissed.

“Under the Act and Commission regulations, a candidate and the candidate’s committee have wide discretion in making expenditures to influence the candidate’s election.”¹ Candidates running in multi-candidate fields have routinely exercised that discretion to form temporary alliances with their opponents in an effort to win. In 2004, for example, presidential candidates John Edwards and Dennis Kucinich “agreed to send their supporters each others’ way if one isn’t getting the votes needed to remain viable in a given caucus in Iowa.”² In 1996, “Bob Dole appealed to Ross Perot ... to drop out of the presidential race and throw his support behind the Republican nominee.”³ The Dole campaign made this attempt following a strategic assessment that Perot’s “bloc of support, if awarded to Dole, could swing several states.”⁴

Such tactics are strongly rooted in the American political tradition. It would be antithetical to that tradition to suggest that the Federal Election Commission should step in to regulate them as “contributions.” Yet in this complaint, FACT does just that, claiming that a conversation that

¹ FEC Adv. Op. 2002-05, at 2.

² Edwards, Kucinich Agree to Share Support in Iowa Caucuses, CNN (Jan. 19, 2004, 3:37 PM), <http://www.cnn.com/2004/ALLPOLITICS/01/19/elec04.prez.edwards.kucinich/>.

³ Susan Baer, *Dole Asks Perot to Quit, GOP Campaign Chief Reportedly Enlists Billionaire's Support*, Balt. Sun (Oct. 24, 1996), <http://articles.baltimoresun.com/1996-10-24/news/1996298007> | ross-perot-dole-perot-supporters:

⁴ *Id.*

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Senator McCaskill's campaign initiated with her Republican opponent's campaign to increase *her* chances of winning reelection is somehow a "contribution" to *his* campaign. This argument has no merit whatsoever.

First, Senator McCaskill's campaign did not initiate the conversation with Mr. Akin's campaign for the purpose of advancing Mr. Akin's candidacy. (In fact, she later said that she "would have felt terrible if Todd Akin had become a United States senator.")⁵ She did so solely to increase her own chances of reelection. Senator McCaskill's campaign determined that Mr. Akin would be Senator McCaskill's "ideal opponent" because "[h]is extreme positions . . . made him anathema to many independent voters."⁶ So her campaign spent a significant amount of money to ensure that he would be her opponent in the general election:

Using the guidance of my campaign staff and consultants, we came up with the idea for a "dog whistle" ad, a message that was pitched in such a way that it would be heard only by a certain group of people. I told my team we needed to put Akin's uber-conservative bona fides in an ad—and then, using reverse psychology, tell voters *not* to vote for him. And we needed to run the hell out of that ad.

My consultants put together a \$1.7 million plan. Four weeks out we would begin with a television ad boosting Akin, which my campaign consultant Mike Muir dubbed "A Cup of Tea." The production costs were pretty low, about \$20,000, because we didn't have to film anything. We just used pictures and voice-overs. We would spend \$750,000 at first and run it for eight or nine days. Then we'd go back into the field and test to see if it was working. If it was, we'd dump in more "McCaskill for Senate" money, and we'd add radio and more TV in St. Louis and Kansas City. The second TV buy would approach \$900,000.⁷

As part of a deliberate effort to ensure that she would face her preferred opponent in the general election, Senator McCaskill authorized her pollster to speak with Mr. Akin's staff to convey a recommendation that he keep a certain advertisement on the air. Her pollster spoke to the Akin campaign in "broad generalities."⁸ The plan worked. Mr. Akin won the Republican primary, but Senator McCaskill trounced him in the general election by a 55 percent to 39 percent margin.⁹

⁵ Sen. Claire McCaskill, *How I Helped Todd Akin Win—So I Could Beat Him Later*, Politico (Aug. 11, 2015), available at <http://www.politico.com/magazine/story/2015/08/todd-akin-missouri-claire-mccaskill-2012-121262>.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Missouri Senate—Akin vs. McCaskill*, RealClearPolitics, http://www.realclearpolitics.com/epolls/2012/senate/mo/missouri_senate_akin_vs_mccaskill-2079.html (last visited Oct. 22, 2015).

The Commission's regulations recognize that a candidate's activities in connection with the opposing party's primary are intended to bolster that candidate's standing in the general election. For example, under the Commission's coordination regulation, if a Democratic Senate candidate coordinates an ad with a third party group opposing a Republican candidate during the Republican primary, that ad is treated as a contribution *to the Democratic Senate candidate* not a contribution to the Republican opponents of the candidate mentioned in the ad (even though they may be the immediate beneficiaries of it). The Commission reasoned that "the advertisement attacking [the Republican candidate] is an in-kind contribution to [the Democratic candidate] because its purpose is to oppose [the Democratic candidate's] potential opponent in the general election and thus influence [the Democratic candidate's] election."¹⁰

The same rationale applies here. Senator McCaskill determined that her best chance of winning the general election meant having Mr. Akin as her opponent. So, using the broad discretion that the law affords her in spending campaign funds, Senator McCaskill spent millions of dollars to ensure that she would have the general election matchup that she wanted. Part of that effort included the conversation between her pollster and Mr. Akin's campaign. These efforts were not "contributions" to Mr. Akin's campaign; they were "expenditures" to support her own reelection and were properly reported as such.

Second, FACT's suggestion that a mere conversation between a campaign's pollster and another campaign amounts to a "contribution" misreads the Commission's regulations. The Commission treats the acceptance of "poll results" by one committee from another committee as a "contribution."¹¹ But when determining whether there has been a "contribution", the Commission looks to whether the first committee has provided the second committee with access to the polling data itself.¹² That did not happen here. At best, the Committee's pollster relied on "broad generalities"—certainly not access to actual polling data—to convince Mr. Akin's campaign to keep the advertisement on the air.

The purpose of section 106.4 is to guard against one committee purchasing a product that the second committee would have otherwise used its own campaign funds to pay for. But it is ridiculous to suggest that the Akin campaign would have ever used its own campaign funds to pay for a conversation with Senator McCaskill's pollster, without any opportunity to verify—or even review—the polling data on its own. The conversation with the pollster was not synonymous with having access to the data itself. In this case, that is particularly self-evident: had the Akin campaign been able to see the data, it might also have recognized that the

¹⁰ Coordinated Communications, 71 Fed. Reg. 33190, 33199 (June 8, 2006).

¹¹ 11 C.F.R. § 106.4(b).

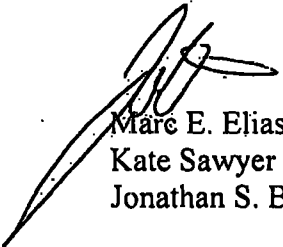
¹² See FEC Adv. Op. 2006-04, at 6.

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campaign's conservative message would doom him for the general election.¹³ Here, the strategic recommendation was worse than "value-less"; it had negative value.

The Commission should reject FACT's entreaty to regulate as "contributions" legitimate strategic gambits that are part of a candidate's own reelection strategy. For the reasons set forth above, the Commission should immediately dismiss the complaint.

Very truly yours,



Marc E. Elias
Kate Sawyer Keane
Jonathan S. Berkon

¹³ This contrasts with FEC Adv. Op. 1990-12, in which the Commission held that a former candidate's sharing of polling data or analysis with a candidate of the same party whom he was supporting, or strategic advice based on that data, would be a contribution. In that case, the strategic advice was as good as the data itself, because the former candidate had a vested interest in seeing the other candidate win the general election. In contrast, here, Senator McCaskill's campaign relayed strategic advice based on polling to Mr. Akin's campaign solely for the purpose of promoting the Senator's own reelection (and the ultimate defeat of Mr. Akin).